LIBRARY
SUPREME COURT, U. S.

No. 73-817

FILED
APR 19 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-817

JOSEPH GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied a fair trial because the indictment was returned a week before the five-year statute of limitations expired, and that the district court erred in denying his motion for a new trial based on allegations of newly discovered evidence.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of falsely representing to an agent of the FBI that he was a citizen of the United States, in violation of 18 U.S.C. 911.[1] Petitioner was given a one year suspended sentence and fined $750 (Pet. 4). The court of appeals affirmed without opinion (Pet. App. 1a).

[1] 18 U.S.C. 911 provides:

> Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both.

On June 7, 1967, an FBI agent interviewed petitioner in connection with an investigation into private garbage collection in New York (T. 49-51).[2] (Petitioner at that time was the manager of a garbage transfer station.) The agent questioned petitioner as to his personal background. Petitioner replied that he had been born in Palmero, Sicily, on December 24, 1932; that he entered the United States through New York City in 1954; that he was married to Frances Gambino, whose maiden name was Costello; that he had no relatives in the United States; and that he had become a United States citizen in 1960 (T. 53-54). Petitioner admits that none of these statements was true and that he was not then, and never has been, a citizen of the United States (Pet. 7).

Petitioner testified that he did not knowingly make any of these false statements (T. 257, 276, 277). He also presented evidence of his inability to use or comprehend the English language effectively (T. 158-159, 202-203, 316-319). He claimed that any misunderstanding between the FBI agent and himself was a consequence of that lack of fluency in English. However, the agent testified that his conversation with petitioner was wholly in English, that he had no difficulty in understanding him, that petitioner never indicated any difficulty in understanding the agent, and that petitioner spoke "very good English" with a "slight Italian accent" (T. 58).

1. Petitioner contends that he was denied a fair trial because the indictment was returned a week before the five-year statute of limitations expired. In *United States* v. *Marion*, 404 U.S. 307, this Court indicated that in some circumstances pre-indictment delay might lead to a denial of due process, but that absent a showing of actual

---

[2] "T." refers to the transcript of the trial.

prejudice in the conduct of the trial or intentional delay by the government to gain a tactical advantage, no such denial is present. Petitioner here, as did the appellees in *Marion*, "rel[ies] solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost." *Id.* at 325-326. Since there is no showing here that the period of delay resulted in actual prejudice or was a deliberate tactic of the government, no due process claim has been made out.

The essence of petitioner's complaint is that the delay caused such a change in petitioner's ability to understand English that the jury would disbelieve his defense that he misunderstood the FBI agent's questions. However, the trial record provided a substantial basis for the district judge to conclude, as he did, that petitioner was not prejudiced by the delay. The evidence against petitioner was compelling. Apart from the agent's testimony concerning his conversation with petitioner, the government presented evidence of similar acts of deception by petitioner with regard to his background.

(1) In a sworn statement to the Immigration and Naturalization Service three months after the FBI interview, petitioner admitted to having worked under an alias because he was "not here legally" and was "afraid" (Government Ex. 2, p. 2; T. 95). (2) In January 1960, petitioner applied for a social security card under his own name, but listed an incorrect birthdate (Government Ex. 4; T. 105). (3) In November 1960, petitioner applied for a social security card under an alias, listing another false birthdate (Government Ex. 5; T. 106). He admitted in 1969 that he falsified his birthdate on that application because he was afraid of being apprehended by the immigration authorities (Government Ex. 11; T. 146).

(4) Between 1960 and 1964, petitioner lived at several different New York addresses under an alias (Government Ex. 13; T. 300). (5) In 1964, petitioner signed an apartment lease under another alias and represented to his landlady for several years that it was his real name (T. 108-141).

The government also offered, in corroboration of the FBI agent's testimony about petitioner's ability to speak English, portions of testimony given by petitioner at an immigration inquiry in September 1967, about three months after the FBI interview. The transcripts demonstrate petitioner's ability to speak and comprehend English at about the time he misrepresented his citizenship (Government Ex. 2; T. 95). In addition, tape recordings of other immigration hearings were available to defense counsel, and at trial he played for the jury a portion of one from June 25, 1970 (T. 316, 318).

2. Petitioner contends that the court erred in denying his motion for a new trial based on allegations of newly discovered evidence. The new evidence consisted of three items: (1) prospective testimony of Carlo Conti, who allegedly overheard the agent's conversation with petitioner; (2) prospective testimony of Frank Garofolo, who would testify as to petitioner's problems with English and reputation for honesty; and (3) alleged tape recordings of an immigration hearing held in 1967, which would demonstrate petitioner's difficulty with English. The motion was properly denied in the circumstances.

Petitioner offers no explanation of why the two witnesses, whose affidavits indicate they had known petitioner for over ten years (Pet. 9, 10), had not been produced at trial. Carlo Conti stated in his affidavit that he worked alongside petitioner for twelve years and was working a few feet away at the time of the FBI interview. The

other prospective witness, Frank Garofolo, was a neighbor of petitioner for ten years. In these circumstances, it was incumbent upon petitioner to explain why Conti and Garofolo could not have testified at trial. Furthermore, in light of the overwhelming evidence against petitioner, the district court properly concluded that the additional evidence would not have affected the verdict. Findings by trial courts on motions for a new trial based on newly discovered evidence will not be disturbed on appeal except in the most extraordinary circumstances. *United States* v. *Johnson*, 327 U.S. 106. No such extraordinary showing has been made here.

The alleged tapes of the 1967 immigration inquiry do not exist. The hearing was never tape recorded. The immigration reporter testified at trial that the inquiry was taken down on a stenotype machine, and the originals of his paper tapes were introduced at trial (T. 91-95). Counsel who prepared the motion for a new trial was not trial counsel,[3] and he may have confused the 1967 inquiry with the 1970 hearing. It is the 1970 hearing that was taped, and portions of that tape were introduced by the defense at trial (T. 318). The reason for the confusion is clear; counsel never listened to the tape recordings himself, but "had a student assistant listen to the tapes and compare them with the transcripts which were supplied to us" (Motion for a New Trial, Clerk's Record 8, Exhibit A, p. 2). Furthermore, the date of the hearing in question is not mentioned in the motion for a new trial.

The assertions in the petition that tape recordings exist and that they reveal difficulties with English not revealed in the written transcript (Pet. 10-11) are based upon the motion for a new trial and therefore represent the unsworn opinion of a student assistant of petitioner's

[3] See Transcript of Sentencing, April 17, 1973, pp. 380-382, 384.

counsel at that time. We further note that the issue of tape recordings was not mentioned in petitioner's court of appeals brief, and should not be heard now. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.